Before we part from this appeal we note that the respondent has filed an application to refer the award to the High Court for its determination. The fact that this appeal has been allowed shall not prejudice the right of the respondent to proceed with the application in accordance with the provisions of the Land Acquisition Act 1960.

Appeal allowed.

Solicitors : *Presgrave & Matthews.*

SOONG AH CHOW & ANOR. v. LAI KOK CHENG

[F.C. (Salleh Abas L.P., Hashim Yeop A. Sani & Syed Agil Barakbah F.JJ.) January 10 & February 11, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 211 of 1983]

Landlord and Tenant – Determination of lease by effluxion of time – Decontrol certificate obtained – Landlord refusing to accept rent – No tenancy existing – Tenant a trespasser – Double rent – Control of Rent Act, 1966, ss. 4–11, 16, 23(1)(a) & 23(2) – Civil Law Act, 1956, s. 28(4)(a).

In this case, by a lease executed on October 3, 1961 between the respondent and the appellants a tenancy was created for a term of 18 years from August 1, 1961 at a yearly rental of $1,800/- payable at a rate of $150 per month. The said lease expired by effluxion of time on July 31, 1979. As from August 1, 1979 all tenders of rental by the appellants were consistently refused by the respondent and the appellants were asked to vacate the premises. On November 3, 1981 the landlord obtained a Certificate of Decontrol under section 23(1) (a) of the Control of Rent Act 1966 and served copies of the certificate to the appellants. On November 26, 1981 the landlord also served a notice to quit on the appellants. In an action brought by the respondent against the appellants the trial judge directed the appellants to render vacant possession of the premises and to pay double rent from August 1, 1979, that is, the date that the trial judge held the appellants to be trespassers. The appellants appealed.

Held: (1) because of the refusal of the landlord to accept any rental from August 1, 1979 no tenancy was created between the parties as from that date. There was therefore no tenancy existing between the appellants and the respondent after July 31, 1979 in respect of the premises; and there is no protection afforded by the Control of Rent Act, 1966 to the appellants after July 31, 1979;

(2) since the trial judge had found the appellants to be trespassers from August 1, 1979 the order to impose double rental from that date was correctly made.

Cases referred to:

(1) *Crook* v. *Whitbread* (1919) 88 L.J. K.B. 959.

(2) *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118.

(3) *Low Kum Yoon* v. *Teh Kim Huah* [1979] 1 M.L.J. 83

(4) *Krishna Sreedhara Panicka* v. *Chiam Soh Yong Realty Co. Ltd.* [1983] 1 M.L.J. 65.

FEDERAL COURT.

James Ponniah for the appellants.
Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court) : The appeal was originally on many grounds against the order of the trial Judge directing the appellants to render vacant possession of premises No. 11, Singapore Street, Seremban and also against the further order that the appellants to pay double rents from August 1, 1979, *i.e.*, the date that the trial Judge held the appellants to be trespassers. At the commencement of the hearing of the appeal, however, counsel for appellant, Mr. James Ponniah, abandoned ground 1-4 inclusive in the memorandum of appeal which had put into issue not only the purported protection conferred on the appellants by the Control of Rent Act 1966 after the expiry of the lease by effluxion of time but also the legality of the Decontrol Certificate issued under section 23 of the 1966 Act. The remaining grounds of appeal have thus been considerably simplified and the issues accordingly reduced to two questions of law, namely, whether the trial Judge was correct in holding that the appellants were trespassers from August 1, 1979 onwards and secondly whether the trial Judge was correct in ordering the payment of double rent from that date.

The bare facts relevant for our present purpose may be summarised as follows. By a lease executed on October 3, 1961 between the landlord of the premises (respondent now) and the appellants, a tenancy was created for a term of 18 years from August 1, 1961 at a yearly rental of $1,800/ payable at a rate of $150/- *per mensem.* The said lease expired by effluxion of time on July 31, 1979. As from August 1, 1979 all tenders of rental by the appellants were consistently refused by the respondent and the appellants were asked to vacate the premises. On November 3, 1981 the landlord obtained a Certificate of Decontrol under section 23(1) (a) of the Control of Rent Act, 1966 and served copies of the Certificate to the appellants on November 24, 1981 and November 26, 1981.

On November 26, 1981 the landlord also served a notice to quit to the appellants.

It does not seem to be disputed that the appellants were holding over but in what capacity is the crucial question. They claim to be holding over under section 16 of the 1966 Act. They also claimed that since the Decontrol Certificate was served on them on November 26, 1981 double rents should commence only from that date and not from August 1, 1979, that is, after the date the lease expired.

According to section 23(1) (a) of the Act where the tenancy of any controlled premises being a tenancy for a fixed period has been determined by effluxion of time, the landlord may apply to the Tribunal for the Decontrol Certificate and upon issue of such Certificate a copy thereof shall be served on the tenant. Section 23(2) provides further that upon the service on the tenant of a copy of the Decontrol Certificate, the premises concerned shall forthwith cease to be controlled premises and any person holding over after such cessation shall cease to enjoy the benefits and protection which he would otherwise have enjoyed under the Act but for such cessation.

It is implied under section 23(1) (a) that a tenancy exists even after the lapse of the lease by effluxion of time. In other words there is an intention of both parties to continue with some form of tenancy upon the expiry of the lease. This construction is fortified by the use of the word "tenant" in subsection (2) of section 23 of the Act and the definition of "tenant" in section (2) of the Act; "tenant" means the tenant of a premises *in respect of which a tenancy exists.*

The appellants relied on the purported protection of section 16 of the Act. If we examine the provisions of section 16 of the Act we would see that the essence of the protection contemplated by these provisions is that so long as the tenant continued to pay the agreed rent and to perform the other conditions of the tenancy he should not be turned out of occupation. See also *Crook* v. *Whitbread.*[1] A common denominator in all these provisions would seem to be that a tenancy *exists* and specified breaches or specified circumstances had occurred in any of those forms specified in paragraphs (a)-(m) inclusive of subsection (1) of section 16 of the Act. Thus *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.*[2] should be read in its proper context. In our view, that case merely emphasises the abolition of "statutory tenancies" by the Control of Rent Act, 1966 and that a tenant can now hold over only by virtue of section 16(1) of the Act.

In short, the gist of the contention canvassed by the appellants is simply as follows. Even though the Control of Rent Act 1966 has done away with statutory tenancies the Act still protects tenants in the situation of the appellants. In our view, however, the protection under the 1966 Act against eviction of a tenant is contained in the provisions of section 16 of the Act; and the protection against unfair increase of rentals is contained in section 4-11 of the Act. The Act confers no other protection to the tenant.

The crux of the issue is what is the position of the appellants when the lease expired after July 31, 1979. Because of the consistent refusal of the landlord to accept any rental from August 1, 1979 no tenancy was created between the parties as from that date. The position in law in similar situations is well expressed by the late Arulanandom J. in *Low Kum Yoon* v. *Teh Kim Huah*[3] where at page 85 the learned Judge said:

> "As his tenancy has been determined by effluxion of time, the tenant has no right to a notice to quit, as there is no tenancy to determine, unlike the statutory tenant under the 1948 and 1956 Control of Rent Ordinances who was deemed to hold over the tenancy with certain rights as a tenant including a right to a notice determining the tenancy."

In other words there has been no tenancy existing between the appellants and the respondent after July 31, 1979 in respect of the premises; and there is no protection afforded by the 1966 Act to the appellants after July 31, 1979.

Section 28(4) (a) of the Civil Law Act 1956 provides that every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double rental until possession is given up by him. The effect of section 28(4) (a) was examined in *Krishna Sreedhara Panicka* v. *Chiam Soh Yong Realty Co. Ltd.*[4] The majority judgment held the view that the court has discretion when to impose double rent. It seems to me that the legislature's choice of the words "shall be chargeable" clearly implies some discretion. But a more difficult question is the extent of the discretion. In *Panicka's* case the trial Judge had found that the parties had come to some sort of understanding and considered it to be unconscionable for the respondents to claim double rent from the expiry of the notice. The majority judgment saw no reason to interfere with the exercise of this discretion. In the present case, since the trial Judge had found the appellants to be trespassers from

August 1, 1979 the order to impose double rental from that date was correctly made.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors : *Stanley Ponniah, Ng & Soo; Gill & Tang.*

NKM PROPERTIES SDN. BHD. v. RAKYAT FIRST MERCHANT BANKERS BHD.

[F.C. (Salleh Abas C.J. (Malaya) Hashim Yeop A. Sani & Syed Agil Barakbah F.JJ.) January 12 & 18, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 163 of 1983]

Land Law – Charge – Failure to pay sum due – Order for sale – Allegation that loan not disbursed in accordance with annexure to charge – Equity – National Land Code; ss. 242 & 340.

In this case a memorandum of charge over land was executed by the appellants in favour of the respondents as security for the sum of $1.8 million with interest. Under the charge the appellants were required to pay on demand all the sums which were due and owing in accordance with the terms of the charge. The appellants received a letter of demand from the respondents but failed or neglected to pay the said sum. The respondent bank thereupon obtained an order of sale by public auction of the land. The appellants appealed. It was argued on the appeal that the loan was not disbursed in accordance with the annexure to the charge in that it was not made after the execution of the charge.

Held: in this case the charge clearly showed that disbursement of the sum of $1.8 million had in fact been made as the appellants acknowledged the receipt of the said sum in the charge. It is against all conscience and logic to allow the appellants to say that no disbursement of the loan had been made by the respondent bank under the charge and the annexure. As the loan was disbursed pursuant to the appellant's application, they cannot be heard to say that the disbursement was not in accordance with the charge.

Case referred to:

(1) *Tai Lee Finance Co. Sdn. Bhd.* v. *Official Assignee & Ors.* [1983] 1 M.L.J. 81.

FEDERAL COURT.

P.S. Ranjan for the appellants.
Saseedaran Achan for the respondents.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): By Originating Summons dated January 12, 1982 the plaintiff bank then (respondents now) obtained an order of sale by public auction of the land held under C.T. 1478 Lot Nos. 499 and 656 Mukim of Seremban charged to the bank under Negeri Sembilan Register of Charge, Presentation No. 4659-80 Volume 318 Folio 84. The background facts of the case which are not in dispute are set out in the affidavit supporting the Originating Summons. A Memorandum of Charge over the said land was executed on June 30, 1980 as security for the sum of M$1.8 million with interest thereon. The said Charge was the first charge over the land and was duly registered on July 9, 1980. By the same Charge the appellants were required to pay on demand all the sums which on their loan account was due and owing in accordance with the terms of the Charge. The appellants received the letter of demand on or about November 6, 1981 but failed or neglected to pay the said sum. The appeal is against the order of sale.

The main grounds of appeal rested on the annexure to the Charge which appears at pages 16-37 of the appeal record. This instrument was also executed on June 30, 1980 between the appellants and the respondent bank. The appellants would appear to rely heavily on clause 3.04 of the annexure relating to disbursement of the loan and clause 5.01 and clause 5.02 of the annexure relating to conditions precedent for disbursement. It was contended by the appellants that to be covered by the Charge the disbursement of the loan must on the language of clause 3.04, be made *after* the execution and presentation for registration of the Charge and upon observance and performance of clauses 5.01 and 5.02 of the annexure and not before. It is not disputed that the disbursement of the loan of M$1.8 million had been made before the execution of the Charge. The letter dated March 25, 1980 ("BCWJ-1") from the appellants to the respondent bank reads as follows:

> "We are pleased to advise that we would like to drawdown on the full amount of the Term Loan of M$1.8 million by 12.00 noon Thursday, March 27, 1980.
>
> Kindly make the necessary arrangement to release the money to Messrs Nik Hussain, Ibrahim & Abdullah, Advocates & Solicitors, for their onward transmission to our Vendor's solicitor, Messrs Thavamani & Partners.
>
> Your co-operation on this matter is greatly appreciated."

The letter dated March 28, 1980 ("BCWJ-3") from the appellants also confirmed the instruction to release the amount of the loan to the solicitors